No. 06-1228

Supreme Court, U.S.
FILED
MAY 8 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A., fka
MBNA AMERICA BANK, N.A.,
Petitioner,

v.

TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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May 8, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute, Inc. states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the submission of this brief in letters filed with the Clerk.

a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

The issue presented is whether the imposition of the West Virginia Business Franchise and Corporate Net Income Taxes on an out-of-state corporation having no physical presence within West Virginia violates the Commerce Clause of the Constitution by unduly burdening interstate commerce. Specifically, this case involves the application and continuing vitality of the Court's holding in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), that a corporation must have "substantial nexus" in a state before it may be subject to a tax and, more fundamentally, the breadth of this Court's holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), that the putative taxpayer's physical presence in the state is required to satisfy the Constitution's nexus requirement.

TEI has more than 7,000 members who represent more than 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. TEI's members represent a cross-section of the business community whose employers are, almost without exception, engaged in interstate commerce. Therefore, TEI members have a keen interest in the issues raised by the decision of the West Virginia Supreme Court of Appeals in this case and will be materially affected by the Court's disposition of these issues.

SUMMARY OF ARGUMENT

1. Fifteen years ago, the Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), affirmed the constitutional imperative of a specific bright-line test for determining whether an out-of-state corporation may be subjected to a state's tax authority: Unless the corporation has a physical presence in the state, the imposition of a sales and use tax collection obligation is illegitimate because a "substantial nexus" does not exist between the corporation and the state, as required by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

2. *Quill* expressly reaffirmed the physical presence standard for sales and use tax purposes, but had no occasion in that case to affirm that the same standard applies to other types of taxes. Since the objectives of the Commerce Clause are the same regardless of the type of tax, the lack of a clearly articulated, separate standard for income tax cases should be laid to the widespread historical acceptance of the principle that the same physical presence standard governs all tax cases.

3. This Court's ambiguous failure to affirm the application of the physical presence standard to income-based taxes has subjected interstate businesses to a broad range of tests by the States. Some States have interpreted *Quill* as implicitly permitting them to fashion their own, State-specific requirements. The proliferation of "standards," however, makes it difficult if not impossible to accurately determine the extent of their income tax obligations.

4. The uncertainty caused by this absence of a clearly articulated bright-line standard for income tax nexus heavily burdens interstate commerce. Many corporations often are unable to divine the scope of many States' authority to tax them, and so must expend considerable resources litigating the issue and addressing a variety of alternate possible compliance scenarios.

5. Different nexus "standards" have emerged from State legislatures, which frustrate the purposes of the Commerce Clause by unduly burdening out-of-state businesses. What is or may be a "standard" in one State is wholly different in another, leaving corporations to speculate and surmise what the law is and how to comply with it. These varied and uncertain standards impermissibly burden interstate commerce.

6. Existing tax compliance burdens shouldered by multi-state corporations reach breaking-point proportions when the complexities of navigating the income tax nexus labyrinth are added. The uncertainty spawned by the absence of a clear nexus standard threatens to become the straw that breaks the back of interstate commerce.

7. The lack of an unequivocal nexus standard has the potential to impair the quality and accuracy of financial statements issued by corporations subject to the reporting and disclosure requirements of the Financial Accounting Standards Board. In the absence of a clear nexus standard, companies may interpret State statutes and judicial decisions inconsistently and thus reach different results concerning the certainty or uncertainty of their tax positions. These differences may obscure, especially on a comparative basis, a company's true financial statement picture.

8. The limitations of a State's taxing authority over out-of-state businesses must be clear. The absence of a clearly articulated bright-line standard to govern a State's power to tax an out-of-state corporation's income significantly burdens interstate commerce. Affirming that the *Quill* physical presence standard applies to all tax types, including income and franchise taxes, is thus essential to a vital and free flowing economy.

ARGUMENT

I. OVERVIEW

Petitioner MBNA is a nationally chartered bank with its principal place of business and commercial domicile in Wilmington, Delaware. It is engaged in the business of issuing and servicing VISA and MasterCard credit cards for cardholder customers nationwide. During the years in dispute, 1998 and 1999, MBNA had no employees, real property, tangible property, or representatives in West Virginia. Its nationwide credit card business was conducted solely by U.S. mail and telephone solicitations, including direct mail and telephone solicitation to residents of West Virginia, none of which originated in West Virginia. In addition, although MBNA derived certain receipts from customers who are West Virginia residents, it neither received nor processed any accounts receivable in West Virginia.

For tax years 1998 and 1999, MBNA paid the West Virginia Business Franchise and Corporate Net Income Taxes based on income attributable to customers with West Virginia addresses, but subsequently filed refund claims with the State Tax Commissioner contending that the West Virginia Tax Commissioner lacked jurisdiction over MBNA. The Commissioner denied the refunds based on a finding that MBNA regularly engaged in business in West Virginia. MBNA filed an appeal with the Office of Tax Appeals, which ruled in favor of MBNA and authorized refunds to MBNA. The Office of Tax Appeals held that without a showing of physical presence, a State may not subject an activity to tax within its boundaries because it lacked a "substantial nexus" with the State as required by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. The Tax Commissioner's appeal to the Circuit Court of Kanawha County was sustained on the grounds that physical presence is not required to establish substantial nexus for purposes of subjecting a foreign corporation to the State's business franchise and corporation net income taxes.

The circuit court reasoned that MBNA's gross receipts from the State were sufficient to meet the Constitution's substantial nexus standard. MBNA appealed to the West Virginia Supreme Court of Appeals, which held that a "significant economic presence" test is a "better indicator of . . . substantial nexus . . . for Commerce Clause purposes [than physical presence]." *Tax Comm'r v. MBNA America Bank, N.A.*, 640 S.E.2d 226, 234 (W.Va. 2006). Thus, after examining the frequency, quantity, and nature of MBNA's economic contacts with the state through its credit card servicing business, the court concluded that West Virginia's imposition of its business franchise and corporate net income taxes does not violate the Commerce Clause.

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause of the Fourteenth Amendment, the Commerce Clause prevents the States from enacting unfair tax or tax collection statutes and thereby imposing "unreasonable clog[s] upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); U.S. Const. amend. XIV, § 1. Although the two constitutional requirements are closely related, "a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, [while] imposition of the tax may nonetheless violate the Commerce Clause." *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992) (citing *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987)). In determining whether a particular State taxing scheme is constitutionally valid, this Court has held that "due process requires some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954). "In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural

concerns about the effects of State regulation on the national economy." *Quill*, 504 U.S. at 312. Thus, absent a sufficient connection between the State and the person, property, or transaction to be taxed, the "fairness" of the particular levy—whether it is properly apportioned or whether it is reasonably related to the services provided by the State—is irrelevant: The tax will be struck down as violative of the Commerce Clause. *See id.* at 305; *Trinova Corp v. Michigan Dep't of Treasury*, 498 U.S. 358, 372-73 (1991); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980).

The threshold importance of nexus to Commerce Clause determinations is underscored by the Court's decisions in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Quill*. In *Complete Auto Transit*, the Court established a four-prong test for determining whether a State tax statute violates the Commerce Clause, holding that such a tax will be sustained only if (1) it is applied to an activity with a substantial nexus with the taxing State, (2) it is fairly apportioned, (3) it does not discriminate against interstate commerce, and (4) it is fairly related to the services provided by the State. 430 U.S. at 279. Thus, *Complete Auto Transit* sets forth a decisional framework for Commerce Clause inquiries regarding whether the tax infringes on interstate commerce. *See, e.g., Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372-73 (1991); *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 227-28 (1980). *Quill* confirmed the applicability of the *Complete Auto Transit* test and harmonized that decision with the Court's 1967 decision in *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967).[2] *Quill*, 504 U.S. at 311. Consistent with *National*

[2] In *National Bellas Hess*, the Court struck down Illinois's effort to require an out-of-state mail order business to collect the use tax on mail order sales made to state residents on both due process and Commerce Clause grounds. The Court explained that sanctioning the imposition of a use tax collection duty on a business that had no physical presence in the State would give rise to "unjustifiable local entanglements" of interstate

Bellas Hess, it effectively held that a taxpayer's physical presence was a proxy for satisfying *Complete Auto Transit's* substantial nexus requirement. *Id.* at 316.[3] The Court embraced a bright-line, physical-presence test of Commerce Clause nexus not only because such a test "furthers the ends of the dormant Commerce Clause" by "demarcati[ng] . . . a discrete realm of commercial activity that is free from interstate taxation," but because it fosters the "interest in stability and orderly development of the law" that undergirds the doctrine of *stare decisis*. *Id.* at 315 (quoting *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring)). Because *Quill* dealt only with sales and use taxes, the Court's decision did not explicitly apply its holding to other taxes. Nevertheless, the Court cautioned that its failure to articulate a physical presence test in other areas "does not imply repudiation of the *Bellas Hess* rule" in those areas. 504 U.S. at 314.

II. THE ABSENCE OF A CLEAR STANDARD TO GOVERN A STATE'S POWER TO TAX AN OUT-OF-STATE CORPORATION'S INCOME UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE

A. Introduction

Fifteen years ago, the Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), affirmed the constitutional efficacy of a bright-line test for determining whether a State may compel an out-of-state vendor to collect sales or use

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commerce. 386 U.S. at 760. The Court reasoned that the administrative and record-keeping requirements that could arise in the absence of a physical presence test "could entangle National [Bellas Hess]'s interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Id.* at 759-60.

[3] The Court in *Quill*, however, did overrule *National Bellas Hess*'s due process holding. 504 U.S. at 316.

taxes in order to satisfy the requirements of the Commerce Clause. The Court explained why the Constitution requires a physical presence of the foreign corporation in the taxing State, as follows:

> [A clear] rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes *leaves much room for controversy and confusion* and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.". . . Moreover, a bright-line test . . . also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.

Id. at 315-16 (1992) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959)) (emphasis added).

Whereas *Quill* expressly defined the rule for sales and use tax purposes, there has been no clearly articulated separate rule that establishes the boundaries of legitimate state authority to impose an *income* tax liability on an out-of-state corporation when it has no physical presence in the State. To be sure, the objectives of the Commerce Clause are the same regardless of the type of tax and the lack of a separate standard in income tax cases is historically due to acceptance of the principle that the same physical presence standard itself governs income tax cases.[4] Regrettably, the States have

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[4] Indeed, ample grounds exist for concluding that the nexus requirement for income tax purposes is *more* demanding than the requirement for sales and use tax purposes. Unlike sales and use taxes, which are transaction-based, the authority to impose an income tax is predicated on a taxpayer's own links to the taxing jurisdiction—that is to say, whether the taxpayer is sufficiently present, or active, in the State (and derives

taken the absence of express precedent as license to distend their tax reach beyond this traditional boundary. As a result, multistate corporations cannot determine with certainty whether their "connections" to a State are sufficient to meet the substantial nexus requirement of the Commerce Clause. Rather, they must expend considerable sums seeking legal advice in respect to the rules in the various jurisdictions in which they might arguably be subject to tax and then justifying their actions to State revenue authorities.

B. In the absence of a clear nexus standard, the efforts of State courts to fill the interpretative void have produced multiple amorphous, uncertain, and burdensome "standards"

The absence of clear precedent requiring the application of the physical presence standard to income-based taxes has subjected interstate businesses to a broad range of tests by the States. Thus, some States have interpreted *Quill* as implicitly authorizing them to fashion their own, state-specific requirements that, absent clarification, make it difficult if not impossible to accurately determine the extent of their income tax obligations. For example, in West Virginia, the Supreme Court of Appeals asserted that a "significant economic presence test . . . [is] a better indicator of whether substantial nexus exists for Commerce Clause purposes," for example, where the corporation is an out-of-state bank and has benefited from West Virginia residents' use of the bank's

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sufficient benefits from the State) to satisfy the Constitution's minimum contacts requirement. The transactions being taxed under a sales and use taxing scheme are themselves a link between the taxpayer and the State, a connection that must be buttressed by the taxpayer's physical presence in order to survive constitutional scrutiny. Where the tax is imposed not on transactions but on income, an even-more-substantial connection is justified. Where the tax is imposed not on transactions but on a business's entire operations (potentially subject to apportionment), an even more substantial connection — physical presence — is constitutionally required.

credit cards. *Tax Comm'r v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W.Va. 2006). The South Carolina Supreme Court in *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (1993), *cert. denied*, 510 U.S. 992 (1993), similarly determined that the use of intangible property by an affiliated company is sufficient even though the owner of the intangible property did not have a physical presence in South Carolina. In *Kmart Properties, Inc. v. Taxation and Revenue Dep't*, 131 P.3d 27 (N.M. Ct. App. 2001), *writ quashed*, 131 P.3d 22 (N.M. 2005), the New Mexico Court of Appeals declined to quantify the difference between the "substantial nexus" under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and the minimum contacts required for due process nexus, but opined that "the use of . . . [the out-of-state corporation's] marks within New Mexico's economic market, for purposes of generating substantial income," established sufficient nexus to satisfy the Commerce Clause. 131 P.3d at 36. In *Lanco, Inc. v. Director, Div. of Taxation*, 908 A.2d 176 (N.J. 2006), *petition for cert. filed*, (No. 06-1236) (U.S. Mar. 9, 2007), the New Jersey Supreme Court upheld imposition of a business income tax on an out-of-state company based on license income from use of that company's licensed intellectual property in New Jersey.[5]

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[5] Finally, in *A & F Trademark, Inc. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004), the North Carolina Court of Appeals agreed with the rationale in *Geoffrey* that because the State provides an orderly society where a business may conduct its business, the corporation is properly subject to income tax. But compare, *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), where the Tennessee Court of Appeals concluded that the State had confused the Commerce Clause and the Due Process standards when asserting that J.C. Penney exercised the substantial privilege of doing business in Tennessee, therefore "sufficient nexus exist[ed]" and J.C. Penney was "receiving the protections which establish a basis for finding of nexus." *Id.* at 836. After a thorough analysis of the Due Process Clause and the Commerce Clause, the court held that while the tax assessment satisfied the Due Process Clause, substantial nexus was

Uncertainty regarding the constitutional legitimacy of the nexus standard in West Virginia and other states impermissibly burdens interstate commerce. Above and beyond the normal burdens of income tax compliance, unique additional burdens are placed on interstate commerce because many corporations often are unable to divine the scope of many states' authority to tax them. As a consequence, these corporations must expend considerable resources litigating the issue and addressing a variety of alternate possible compliance scenarios. Continued uncertainty thus imposes real and unnecessary burdens on interstate commerce.

C. In the absence of a clear nexus standard, the efforts of State legislatures to fill the guidance vacuum have also produced uncertain, burdensome "standards"

Different nexus "standards" have also emerged from State legislatures that have frustrated the purposes of the Commerce Clause by unduly burdening out-of-state businesses. In Georgia, the legislature enacted a statute that does not require a corporation's in-state physical presence in order to impose the State's income tax on a remote corporation that is doing business in the State. Ga. Code Ann. § 48-7-31(a). Indeed, the Georgia statute sets no threshold for taxing out-of-state businesses, but rather provides that a corporation is "doing business within . . . [the] [S]tate if it engages . . . [in] any activities or transactions . . . [within the State] for the purpose of financial gain or profit," regardless whether the corporation maintains an office or place of doing business within the State or engages in *any* "activity or transaction . . . connected with interstate . . . commerce." *Id.* (emphasis added). Similarly, Illinois imposes "a tax measured by net income on . . . [every] corporation for the privilege of earning

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lacking to sustain the tax under the Commerce Clause upon an out-of-state bank because the bank was not physically present in the State. *Id.* at 842.

or receiving income in . . . [the] state," Ill. Comp. Stat. 5/201(a), and expressly does not require a physical presence. Ill. Admin. Code tit. 86, § 100.9720. Louisiana imposes its corporation income tax on net income earned or derived from sources within the State and also does not require a physical presence. La. Rev. Stat. Ann. § 47:287.67. Maryland, without a physical presence requirement, imposes a tax on every corporation doing business within the State. *See* Md. Code Ann. [Tax-Gen] §10-102.6. In Oregon, legislation is pending that would mandate that a nonresident individual or business is deemed to have substantial nexus if the corporation's sales to in-state residents exceed $500,000. S. 177, 74th Leg. (Or. 2007).

Finally, in the case at hand, West Virginia imposes its business franchise tax and its corporate net income tax on a foreign taxpayer, with no physical presence in the State, if the taxpayer is engaged in business or doing business in the State. Pursuant to sections 11-23-5a(d) and 11-24-7b(d) of the West Virginia Code, a financial institution that is commercially domiciled in another State is presumed to be engaged in business in West Virginia if it obtains or solicits business with 20 or more customers in the State or it has gross receipts that exceed $100,000. *See* W. Va. Code §§ 11-23-5a(d) & 11-24-7b(d). While the $100,000 threshold exempts some out-of-state businesses from tax in the State, the West Virginia statute disregards *Quill's* physical presence requirement. All these varied and uncertain standards impermissibly burden interstate commerce.[7]

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[6] Md. Dep't of Assessment and Taxation, *Interstate Commerce Tax Act – Domestic and Foreign Corporations – Nexus Requirements*, ADR No. 2 (Dec. 1, 1996).

[7] The District of Columbia imposes its corporation franchise tax on the amount of net income derived in the jurisdiction for "the privilege of carrying on or engaging in any trade or business within the District *and* of receiving . . . income . . . from sources within the District," D.C. Code

D. The absence of a clear nexus standard has exacerbated the existing income tax compliance burden on multistate corporations

Multistate corporations already labor under weighty tax compliance burdens. A 2002 study concluded that state income tax compliance costs are approximately double the costs of the federal tax compliance burden,[8] in large measure because of differences among the States. "[S]tates differ in their reporting and filing procedures that determine which corporations must file a return, which related entities file together or separately, due dates for filing and paying taxes, and acceptance of federal extensions."[9] Some States require combined reporting, some States require the filing of a consolidated return, and some States allow separate reporting by each entity within an affiliated group. In some cases, foreign affiliates are included in the combined reporting return. In other cases, only the domestic unitary affiliates are included in a combined return.

In addition, the apportionment and allocation rules for a multistate corporation vary among the States. For example, many States have adopted the Uniform Division of Income for Tax Purposes Act[10] that requires a corporation to

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Ann. § 47-1810.01 (emphasis added), but does require physical presence before such activities can create nexus. *See* D.C. Code Ann. § 47-1805.02(5). Connecticut imposes a corporation business tax on every company "carrying on, or having the right to carry on, business in . . . [the] state," Conn. Gen. Stat. § 12-214(a)(1), but also requires physical presence to satisfy the Commerce Clause's substantial nexus requirement.

[8] Sanjay Gupta & Lillian Mills, *How Do Differences in State Corporate Income Tax Systems Affect Compliance Cost Burdens?* (2002).

[9] *Id.* at 5.

[10] The Uniform Division of Income for Tax Purposes ("UDITPA") is a model act for the allocation and apportionment of income among States. It was drafted to remedy the diversity that existed among the States for determining their respective shares of a corporation's income. UDITPA

"separate its income into business income, which is subject to apportionment among the various States, and nonbusiness income, which is allocated to a single state."[11] Although States have historically utilized an equally weighted, three-factor formula consisting of sales, property, and payroll to apportion business income, many States have deviated from that formula. For instance, many States heavily weight the sales factor. Furthermore, while sales are typically assigned to a particular State based on the destination of the purchase, "some states use a 'throwback rule' that reassigns sales to the state of origin if the corporation is not taxable in the destination state."[12]

States also define a corporation's tax base differently. The majority of States use the federal taxable income as a starting point, but five States do not. There are also variations among the States on what items of income and deductions are included in taxable income. Additionally, depreciation policies vary depending on the type of industry. Although most States use the federal depreciation rules, a few States adopt various "dates of federal regulations, different treatments for specific assets, disallowance of . . . accelerated depreciation, differences in bases of property, differences in treatments of assets based on purchase dates or dates placed in service, disallowance of optional federal deductions, use of investment tax credits in lieu of depreciation, and different treatments of in-state and out-of-state assets."[13]

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divides income into business income, which is apportioned by means of a three-factor formula, and nonbusiness income, which is allocated according to the type of income and the type of property giving rise to the income.

[11] *See* Gupta & Mills, *supra* note 8, at 6.

[12] *See id.*

[13] *See id.*

The State tax compliance burden on multistate corporations is substantial and shows no sign of abating. That burden becomes crushing, however, when the uncertainties and complexities of navigating the income tax nexus labyrinth are unnecessarily added to it. This unnecessary uncertainty, spawned by this Court's ambiguous failure to affirm the application of its physical presence rule to income taxes, rises to constitutional proportions when added to the other burdens posed by the multiplicity of state tax regimes. It threatens to become the straw that breaks the back of interstate commerce.

E. The absence of a clear nexus standard threatens to undermine the accuracy of a taxpayer's financial statement disclosures

The lack of a common nexus standard has the potential to diminish the quality and accuracy of financial statements issued by corporations subject to the reporting and disclosure requirements of the Financial Accounting Standards Board. In particular, FASB Interpretation No. 48 ("FIN 48"), *Accounting for Uncertainty in Income Taxes,* is designed to increase "relevance and comparability in financial reporting of income taxes by clarifying the way companies account for uncertainty in income tax assets and liabilities."[14] FIN 48 provides guidelines for recognizing and measuring tax positions for reporting in financial statements. Pursuant to FIN 48, to recognize a tax benefit, a tax position must be "more likely than not" to be sustained by a taxing authority, based on the technical merits of the position during an audit including the appeals and litigation process.

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[14] Financial Accounting Standards Board, Financial Accounting Series, No. 281-B, *FASB Interpretation No. 48–Accounting for Uncertainty in Income Taxes* (2006). FIN 48 was issued by the Financial Accounting Standards Board in July 2006 and is effective for fiscal years beginning after December 15, 2006.

In the absence of a clear nexus standard, companies may interpret State statutes and judicial decisions inconsistently and thus reach different results concerning the certainty or uncertainty of their tax positions. These differences may obscure, especially on a comparative basis, a company's true financial statement picture. Uncertainty regarding the contours of the Constitution's nexus requirement, in particular, will make it difficult for publicly traded companies to comply with FIN 48. Indeed, since State statutes of limitations may not start to run until a taxpayer files a return, and companies without physical presence in a State may not file returns, under this Court's precedents the consequences of an unclear nexus standard may materially affect the financial statements retrospectively for many years. The quality, consistency, and reliability of financial statements in respect of state tax matters for investors, regulators, and the general public will be significantly enhanced if multistate corporations could rely on a common standard controlling the determination of what constitutes substantial nexus.

CONCLUSION

The Court should take this case in order to bring clarity to the nexus area and to affirm that the *Quill* physical presence standard applies to all tax types, including income and franchise taxes.

For the foregoing reasons, the Court should grant a writ of certiorari in this case.

Respectfully submitted,

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May 8, 2007